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NO. 675

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

CRAWFORD MARTIN, as Secretary of State of the State of Texas, JOHN CONNALLY, as Governor of the State of Texas, WAGGONER CARR, as Attorney General of the State of Texas, and EUGENE LOCKE, as Chairman of the State Democratic Executive Committee of Texas, *Defendants-Appellants*

vs.

GEORGE H. W. BUSH, MRS. TOM M. THAWLEY, ROLAND E. SLEDGE, ANTHONY J. P. FARRIS, AND BARBARA BARRETT, *Plaintiffs-Appellees*

and

PETER O'DONNELL, JR., as Chairman of the State Republican Executive Committee of Texas, WILLIAM M. ELLIOTT, as County Judge of Harris County, Texas, and ROBERT E. TURRENTINE, JR., as County Clerk of Harris County, Texas, *Defendants-Appellees*

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

APPELLANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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In the light of the judgment and opinion rendered by this Honorable Court in *Wesberry v. Sanders,* Docket No. 22, this Term, it has become increasingly important that the Court consider thoroughly the differences between that case and this one. Other vital questions are raised by the present appeal which were not raised or decided in the *Wesberry* case.

The following questions were not decided in the Georgia case: (1) whether the Texas Legislature

should be given a reasonable opportunity to enact a new districting statute before entry of a final order; (2) whether the District Court had the authority to order that all Members of Congress shall be elected from the State at large pending enactment of another apportionment statute; (3) whether the District Court abused its authority in ordering at-large elections, in the light of facts peculiar to the State of Texas and the consequences of this type of election. These questions are substantial and deserve plenary consideration upon briefs and oral argument.

Also unanswered by the Supreme Court is whether and to what degree any deviation from absolute equality of population is permissible—what tolerance will be allowed. In the Georgia case, the order of remand gives the District Court an opportunity to elaborate upon the general objective of "equal representation for equal numbers of people," for the guidance of the Georgia Legislature. In the Texas case, the District Court has already entered a final decree, and the Texas Legislature is left under a duty to reapportion without any indication of the limits af permissible deviation from absolute population equality—unless, indeed, the District Court's opinion permits no deviation whatever. Affirmance of the District Court's judgment without more in the present case would not only leave these questions unanswered, but would lead to disastrous consequences not threatened in the Georgia case.

Wesberry v. Sanders reached the Supreme Court from an order of dismissal, and has been remanded to the District Court for determination of what relief should be given. In the opinions rendered in the District Court, all three Judges expressed themselves in favor of postponing entry of final judgment on the

merits until the State Legislature had been given a reasonable opportunity to redistrict. *Wesberry v. Vandiver*, 206 F. Supp. 276, at page 282 (first paragraph under headnote 8) and at page 287 (last paragraph). The District Court did not indicate what form of relief it would order if the Georgia Legislature failed to pass a valid redistricting law within the time allowed by the Court. In this posture, the citizens of Georgia apparently are not faced with the prospect of at-large election of their Congressmen this year. But not so for the citizens of Texas.

In the present case, the District Court heard and decided the case on the merits and held the Texas apportionment statute to be invalid. It enjoined the holding of any further elections under the statute and ordered that all Texas Congressmen be nominated and elected from the State at large until the Legislature enacts a valid redistricting statute. It is this order for an election at large with which appellants are now most immediately concerned, and they urge—yea, implore—this Court not to enter an order which would reinstate the District Court's judgment requiring an immediate reapportionment or at-large nomination and election of Congressmen in the 1964 elections.

Judge Noel, in his dissenting opinion, stressed the calamitous effect which an at-large election of all Congressmen would have on the rights of Texas citizens to fair representation in Congress, and appellants have vigorously urged the inequity of this form of election. (Jurisdictional Statement, pp. 37-42; Brief in Opposition to Motion to Affirm, pp. 4-7.)

The majority opinion in the District Court recognized that under the operation of the election machin-

ery of Texas, the reapportionment must be accomplished by February 3, 1964. (Jurisdictional Statement, p. 31, footnote 8, and p. 66.) February 3 was the final date for candidates to file in the primaries, which will be held on May 2. (Vernon's Texas Election Code, Art. 13.03.) At the date of this supplemental brief, the Texas election machinery is in full swing. The congressional candidates, along with other candidates, have been assessed and have paid their portion of the expenses of holding the primaries. (In Texas, the full expense of the primary elections is borne by the candidates. Final date for payment of the assessments was February 15. Election Code, Art. 13.08.)

In their Motion to Affirm, appellees suggested that an at-large election could be avoided by the enactment of emergency legislation changing the February 3 deadline. At this late date, it is out of the question to hope that the Legislature, if convened in special session, could enact a redistricting law and set a new deadline, even as emergency legislation to become effective immediately (which requires a 2/3 vote in each House of the Legislature), in time for candidates to file for the offices and conduct an adequate campaign for the election to be held on May 2. Moreover, the Legislature should not be forced into hasty action under pressure of coercion and time limits which would not permit the study and deliberation which should go into an apportionment statute.

The population of Texas is such that mathematical reapportionment will require us, for the first time in history, to ignore county lines, divide many of our cities and place some rural and urban areas in the same district. This is revolutionary and must be carefully done. For these reasons, immediately upon no-

tification of this Court's action the Governor requested the Lieutenant Governor and the Speaker of the House of Representatives to have the Legislative Council, the research arm of the Legislature, study the problems of congressional redistricting in light of *Wesberry v. Sanders.*

Even if a new law could be enacted before the 1964 primaries, the disruption of the entire election machinery, the undoing of everything that has already been done, the wasted expense to which the present district candidates would have been subjected in getting their campaigns under way where their districts were later changed or abolished, and the inevitable confusion which would follow a redistricting in the middle of an election, is too high a price to pay for gratification of appellees' demand for relief. Even the appellees would not ask so much, for they concede (Motion to Affirm, p. 7) that the requirement of at-large elections or forced reapportionment should be withheld "where it is clearly shown that the invalidation of a state apportionment statute will unavoidably and irreparably disrupt state elective processes."

The gross inequity of an election at large is its most damning feature. Apart from that, the problems encountered in conducting such an election, without benefit of any statutory regulations, and the chaos which would inevitably accompany the election, condemn it as impractical. Texas election laws provide no procedure for at-large congressional elections as ordered by the District Court. We list a few of the questions our laws leave unanswered:

(1) What would be the deadline for candidates to file?

(2) Who would have authority to set the deadline?

(3) Would all candidates who have filed for Congress under the present statute be automatically converted into candidates for the offices to be nominated and elected at large?

(4) Would this list make up the complete slate of primary candidates?

(5) Could other candidates file?

(6) In view of Article 13.47a of the Election Code, which requires independent candidates to file a declaration of intent by the February filing deadline for the primaries, could independent candidates for the state-wide offices qualify for a place on the general election ballot?

(7) Would each candidate run against all the others, with the 23 receiving the highest votes being declared the winners?

(8) But state law requires nomination by majority vote in the primaries. Would this requirement be abrogated?

(9) If not, how would it be determined whether any candidates were nominated in the first primary and who the candidates would be in the runoff primary?

(10) On what basis, and by whom, would the candidates be assessed their share of the primary eelction expenses?

(11) On what basis would the assessments be prorated to the county committees charged with the duty of paying the expenses of the primary elections in their respective counties?

It is no answer to say that the Governor could convene a special session of the Legislature to enact a statute providing the machinery for an at-large election: such a session would cost the State close to half a million dollars and, even more to the point, the legislation could not be enacted in time to provide an

orderly procedure and an adequate period for candidates to file and to conduct an effective state-wide campaign for an election to be held on May 2. A separate primary at some later date for nomination of congressional candidates would not be a solution, because the expense to the candidates for financing the separate election would be utterly prohibitive. From whatever angle the matter is viewed, indescribable chaos and confusion is in store for this State if its Congressmen must be elected at large in 1964.

If the District Court's decision is left to apply to the 1964 Texas congressional elections, this will be the first time the federal courts have intervened and interrupted state election proceedings already in progress. Moreover, this situation is not unique to Texas. If Texas is required to redistrict or hold at-large congressional elections in 1964, the same requirements can be imposed in all other States where lawsuits have been or will be filed. The dire results of this are obvious.

Appellants again urge the Court to take jurisdiction of their appeal so that full consideration may be given to the questions which the Court has not yet decided. If the Court should not be so inclined, we earnestly urge the Court not to enter any order which would have the effect of requiring election of Congressmen from the State at large in 1964.

Respectfully submitted,

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PROOF OF SERVICE

I, MARY K. WALL, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 19th day of February, 1964, I served copies of the foregoing Supplemental Brief in Opposition to Motion to Affirm on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To WILLIAM B. CASSIN, ESQ., 1600 Esperson Building, Houston, Texas 77002, and THAD T. HUTCHESON, ESQ., 2110 Tennessee Building, Houston, Texas 77002, Attorneys for Plaintiffs-Appellees.

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